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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

In re:

DEAN GORDON POTTER,  
Debtor.

UNICO SERVICES INC.,  
Plaintiff,

vs

UNITED STATES OF AMERICA,  
Defendant.

) Case No. C-07-4826-CW  
) **Lead Case**

) Case No. C-08-00800-CW

) **Consolidated Case**

) **JOINT CASE MANAGEMENT  
STATEMENT**

1 Pursuant to the Court's Case Management Scheduling Order, filed February 12, 2008,  
2 and Civil L.R. 16-9(a), the United States of America, by and through its undersigned attorneys,  
3 the Plaintiff, Unico Services Inc. (Unico) and the debtor, Dean Gordon Potter (Potter), by and  
4 through their undersigned attorneys, hereby submit this Joint Case Management Statement.

#### 5 JURISDICTION AND SERVICE

6 The Court has jurisdiction over the Potter's objection to claim of the Internal Revenue  
7 Service (IRS) and the refund adversary complaint filed in *In re: Potter* (collectively referred to  
8 as "Potter's federal tax disputes") pursuant to 11 U.S.C. §§ 505(a) and 505(b), 28 U.S.C. §§  
9 157(a), 157(d), 1334(a), and 1334(b). The Court has jurisdiction over Unico's refund claims  
10 for the tax periods ending June 30, 2000, September 30, 2000, and December 31, 2000,  
11 pursuant to 26 U.S.C. § 7422 and 28 U.S.C. § 1346(a). The United States contends that the  
12 Court lacks jurisdiction over Unico's claim for refund for the tax period ending September 30,  
13 2001, because Unico did not fully pay the assessment of this tax as required by *Flora v.*  
14 *United States*, 362 U.S. 145 (1960). The Court has jurisdiction over the United States'  
15 Counterclaim in *Unico v. United States* pursuant to 26 U.S.C. §§ 7401, 7402, and 7403 and 28  
16 U.S.C. §§ 1340 and 1345. The Court has personal jurisdiction over Unico and Potter, and  
17 venue was resolved by motion. No parties remain to be served.

#### 18 FACTS

19 1. **The United States contends the following:** After thirty years of owning and operating  
20 Unico as its key employee and Chief Executive Officer, Potter entered into an Offshore  
21 Employee Leasing ("OEL") Arrangement designed to avoid taxes and transfer much of  
22 his compensation from Unico offshore. The OEL Arrangement was constructed by tax  
23 shelter promoters and required a series of simultaneous acts by the Potter, Unico, and  
24 other entities created for such schemes. Under the OEL Arrangement, Potter  
25 purportedly resigned from his longtime employment at Unico to become an employee of  
26 Pixley, a recently-created Irish entity. Potter in fact remained an employee of Unico  
27  
28

1 after January 1, 1998, and through at least 2005. No other Unico employee  
2 participated.<sup>1</sup>

- 3 2. **The United States further contends:** that Potter and Unico used jurisdictions that  
4 engage in bank secrecy (offshore tax havens) intending to impede any Internal  
5 Revenue Service ("IRS") examination of the OEL Arrangement. The use of offshore tax  
6 havens was further intended to impede any IRS collection efforts. The structure of the  
7 OEL Arrangement had no independent business purpose other than to avoid  
8 employment and income tax. As part of the overall arrangement, the OEL arrangement  
9 promoters working for Potter drafted and caused to be executed various trusts,  
10 transfers, and lines of credit. The trust scheme was primarily intended to conceal  
11 Potter's control of the compensation transferred offshore. The trust scheme was  
12 deliberately complex and used offshore tax havens with the intent to impede the IRS.
- 13 3. **The United States further contends:** that the Potter compensation held offshore is  
14 unreported taxable income to Potter, and the Internal Revenue Service assessed  
15 substantial penalties for failure to file information with respect to foreign trusts. The  
16 Service further assessed Unico for corporate income and employment taxes relating to  
17 the Potter compensation. Some of these tax assessments were duplicated against  
18 both Potter and Unico to avoid litigation and collection risk. The United States contends  
19 that the assessments should be made consistent, if at all, only after all factual issues  
20 are determined, appealed, and the tax liabilities fully collected. The United States  
21 contends that there is a risk to collection in a case with a multiplicity of entities, where  
22 assets have shifted between entities, and where one entity concedes the tax liabilities.
- 23 4. **The United States further contends:** that the tax liabilities at issue here exceed \$8  
24 million. Potter's personal income tax years at issue are 1998 through 2005 (although  
25  
26

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27 <sup>1</sup> Even an outline of the transaction requires many pages. For more detail, please refer to the  
28 Counterclaim of the United States in the Unico case filed November 16, 2007.

the OEL Arrangement appears to have run only through 2003). The Unico employment tax periods at issue are June 30, 2001, September 30, 2001, December 31, 2001, June 30, 2002, September 30, 2002, December 31, 2002, June 30, 2003. The Unico corporate income tax periods at issue are the fiscal years ending June 30, 1998 through June 30, 2001.

5. **Potter and Unico** object to the United States' characterization of the terms "tax shelter, trust scheme, and bank secrecy." **Unico contends:** that the United States through its agency the Internal Revenue Service (IRS) arbitrarily assessed employment taxes (FICA & FUTA) for the tax periods June 30, 2000, September 30, 2000, and December 21, 2000, and September 30, 2001, plus penalties under IRC §§6662(a) and 6656. These assessments for employment taxes were asserted on the erroneous basis that Unico paid salaries to Potter. The IRS never allowed any salary deductions for Potter for the periods at issue, and Unico never claimed any salary deductions for Potter. Potter was being paid by Release Me and/or Fair Skys for services he was performing and appropriate employment taxes were being withheld.

6. **Potter contends:** that he entered into an employment agreement with Pixley (Irish Corp.) which assigned its rights to IESI (Barbadian entity). IESI had the worldwide rights to Potter's services pursuant to the agreement, and in exchange for an agent's salary, Potter had certain fringe benefits including a non-qualified deferred compensation plan upon retirement. Potter entered into the above transaction based on competent legal advice from Alan R. Eber, Esq. and Michael Chatzky, Esq. The sole purpose for structuring this transaction was to provide a retirement program for Potter with some asset protection planning.

7. **Potter further contends:** IESI subleased Potter's services to Release Me (U.S.) which in turn assigned its rights to Fair Skys (U.S.). (Both Release Me and Fair Skys are referred to as Fair Skys.) Fair Skys obtained exclusive rights to Potter's services in the

U.S. which it leased to UNICO and UNICO paid Fair Skys for Potter's services. At the time of the transaction, UNICO was owned 60% by Potter.

8. **Potter further contends:** that UNICO paid Fair Skys a fee pursuant to the leasing agreement, and Fair Skys, in turn, paid Potter a salary, which Potter reported as income on his tax returns and Fair Skys, an independent entity, retained a percentage of its fee. Fair Skys paid employment taxes on Potter's salary. After Fair Skys's percentage and Potter's salary, the balance of the funds was sent to IESI to fund Potter's non-qualified deferred compensation plan.

9. **Potter further contends:** that the Internal Revenue Service has asserted that Potter is taxable on payments made by Fair Skys to fund Potter's non-qualified deferred compensation plan on several theories, i.e. sham, lack of economic substance and constructive receipt. The IRS has taken a shotgun approach in attempting to tax these proceeds even though Potter had no control of these funds and did not receive any benefit from the funds plan, directly or constructively.

10. **Potter further contends:** that the penalties asserted in an amount in excess of six million dollars under IRS §§6038 and 6077 are erroneous. The IRS has failed to state any meaningful facts upon which it is basing the penalties that it is asserting. In addition, the IRS has asserted negligence penalties under §6662, which again is erroneous as Potter acted in good faith in reliance on competent legal advice in entering into the above transaction. He acted as any reasonable and prudent person would have acted.

### **LEGAL ISSUES**

**The parties request** that the Court confirm that all Federal Rules of Civil Procedure shall apply to this entire proceeding.

1. **The United States will argue, *inter alia*,** that the OEL arrangement should be disregarded under doctrines of economic substance, substance-over-form, and step-

1 transaction. For recent articulations of these related theories see *Coltec Industries, Inc.*  
2 *v. United States*, 454 F.3d 1340 (Fed. Cir. 2006); *Brown v. United States*, 329 F.3d 664  
3 (9<sup>th</sup> Cir. 2003); *Jade Trading LLC v. United States*, 80 Fed. Cl. 11 (2007). See also  
4 *Sparkman v. Commissioner*, 509 F.3d 1149 (9<sup>th</sup> Cir. 2007); *Robino Inc. Pension Trust v.*  
5 *Commissioner*, 894 F.2d 342 (9<sup>th</sup> Cir. 1990); *Casebeer v. Commissioner*, 909 F.2d 1360  
6 (9<sup>th</sup> Cir. 1990). The form of the OEL arrangement should be disregarded as an  
7 elaborate attempt to avoid federal taxation, and the substance of the transaction should  
8 control. Potter in fact remained Unico's employee, as he had been for many years. The  
9 only purpose of the arrangement was to conceal taxable income and to avoid tax  
10 collection after the scheme was unwound.

11 2. **The United States** may also argue that the money transferred offshore through the  
12 OEL arrangement should be taxed to Potter under the doctrines of economic benefit  
13 (Treas. Regs. §1.451-2), constructive receipt and assignment of income.

14 3. **UNICO's position** is that without salary payment to Potter from UNICO, there can be  
15 no employment taxes owed for Potter by UNICO. No salary deductions were claimed  
16 for Potter and none were allowed by the IRS.

17 4. a. **Potter's position** is that the funds being held pursuant to a foreign non-qualified  
18 deferred compensation by IESI are not taxable to Potter as Potter did not actually or  
19 constructively receive the funds. Potter's position that he was not in constructive  
20 receipt of the funds is based on the IRS Rabbi Trust rulings [IRS Lt. R1. 8113107 and  
21 subsequently blessed through the issuance of Rev. Proc.92-64, 1992-2CB 422, and  
22 other provisions of the IRC]. At the time of these transactions, the law did not treat  
23 funds held by a foreign non-qualified deferred plan as constructively received by the  
24 employee. Congress has since changed the law so that an employee must recognize  
25 as income funds placed by an employer in a foreign non-qualified deferred plan.  
26 Internal Revenue Code §409(b)(1), (3), and (4).

27 4. b. **Potter further contends** that none of the penalties should apply. Section 6662 would  
28 only apply if Potter acted negligently, but where he relies on competent counsel, he

cannot be held liable under §6662. The Section 6077 penalty applies only if the person is required to file a return as required by IRC §6048, but only if the failure to file is due to willful neglect, and not reasonable cause. Potter was not required to file the information returns required by §6048, and in any event if he was required to file, his failure was due to reasonable cause. The §6038 penalty required the filing only if such person controls the foreign entity. Again, Potter had no control under §6038(e)(2), and even if Potter was required to file, his failure was due to reasonable cause. Finally, the penalty calculations of the IRS are in error and are based on mere speculation. The positions the IRS has taken have been inconsistent and arbitrary. They allege employment taxes against UNICO without allowing any salary deductions for Potter. The IRS asserts penalties without detailing the basis, and they are speculative. Finally, the IRS fails to concede the validity of Rabbi Trusts for foreign non-qualified plans as these were valid at the time such a plan was created for Potter.

#### **MOTIONS**

There currently are no motions pending with the Court in either case. Prior to the transfer of the Unico case, there were no pending motions in the Eastern District. Likewise, prior to the Court's opinion withdrawing the reference in the Potter's bankruptcy case there were no pending motions before the Bankruptcy Court.

The parties view the trial of these consolidated cases as best accomplished in three phases. The first phase would be a determination tax liabilities related to the claim of the foreign non-qualified deferred compensation plan and the OEL arrangement. This phase would include the tax liabilities of the Potter for tax years 1998 through 2003 and all of Unico's tax liabilities at issue in this case. The second phase should be a determination of Potter's tax liabilities for tax years 2004 and 2005. These two years differ factually and legally from the preceding years in that they do not involve the OEL arrangement. The third phase would be enforcement of the federal tax liens and judgment lien on the property or rights to property of Unico and Potter, if he is determined to have any tax liability (and assuming the automatic stay

1 is modified or terminated). Discovery should proceed concurrently on all phases so that the  
2 parties need not revisit witnesses.

3 The parties also anticipate that Motions for Summary or Partial Summary Judgment will  
4 be filed in due course.

#### 5 **AMENDMENT OF PLEADINGS**

6 The parties do not anticipate the amendments of any pleadings at this time. The United  
7 States may seek to add additional parties during the collection phase of this litigation. The  
8 United States alternatively could file a separate action against certain third parties concerning  
9 the collection of the Unico liabilities.

#### 10 **EVIDENCE PRESERVATION**

11 The parties are currently discussing this particular issue. The United States would in  
12 particular wish to know how Potter and Unico are preserving electronic data (assuming there is  
13 any electronic data) and communications between the parties, the tax advisors, and any  
14 offshore entities.

#### 15 **DISCLOSURES**

16 The parties in both consolidated cases previously waived initial disclosures. The  
17 parties continue to waive initial disclosures pursuant to Federal Rules of Civil Procedure  
18 ("FRCP") 26(a)(1).

#### 19 **DISCOVERY**

##### 20 **Discovery taken to date:**

21 The parties have conducted some limited discovery prior to the cases being  
22 consolidated. Potter served initial interrogatories in the bankruptcy case and adversary  
23 proceeding. Likewise, Unico served limited interrogatories and requests for admissions while  
24 the case was pending in the Eastern District. The United States has responded to both sets of  
25 discovery. The United States is in the final stages of preparing electronic copies of documents  
26 responsive to Potter's requests, which will be provided to counsel.

27 The United States requested an order from the Bankruptcy Court authorizing a  
28 Bankruptcy Rule 2004 examination of Potter. Four days of examination have been conducted.

1 Additional days of examination will likely be required. As part of the examination process, the  
2 United States requested the production of numerous documents, some of which were  
3 produced. The United States was informed that many of the documents requested were in  
4 storage at the Unico offices. The United States is in the process of contracting, either  
5 internally or externally, for the scanning of the numerous documents. A dispute has arisen  
6 regarding how that process will be accomplished. The number of boxes to be scanned is in  
7 excess of 200 boxes. Potter and Unico wanted the scanning to be accomplished at the offices  
8 of Unico because of security and assurance that no records would be lost or misplaced.  
9 Further Potter and Unico contend that most of the records have already been examined by  
10 IRS personnel. The United States contends that is impractical and inordinately expensive.  
11 The United States needs to have those boxes scanned at the offices of the company that  
12 ultimately will do the scanning.

13 **Timing and Limitations on Discovery:**

14 The parties herein agree that discovery in this action shall be governed by Federal  
15 Rules of Civil Procedure, and the Local Rules of the United States District Court for the  
16 Northern District of California, without modification, except to the extent provided below.

17 Depositions: Pursuant to Fed. R. Civ. P. 26(b)(2), the United States contends that  
18 there should be no presumptive limitations upon the number of oral or written depositions  
19 taken under Fed. R. Civ. P. 30 and 31 due to the unusual complexity of the transaction at  
20 issue. In addition, though most depositions will be completed within the time limits of Fed. R.  
21 Civ. P. 30(d)(1), the United States anticipates that some of the depositions will take longer  
22 than one day per witness. Plaintiff and Potter anticipate that they may, at some point, object  
23 to the number of depositions that the United States may take. The parties shall use  
24 reasonable efforts to confer prior to scheduling depositions. In addition, Potter may attempt to  
25 utilize Letters Rogatory.

26 Interrogatories: Absent stipulation of the parties or unless otherwise ordered by the  
27 Court, there shall be no presumptive limitations upon the number of written interrogatories  
28 propounded pursuant to Fed. R. Civ. P. 33.



### **SETTLEMENT AND ADR**

Potter and Unico have stated a desire to have the case referred to a settlement judge. The United States does not oppose such a request, especially if it can result in narrowing the issues to be tried. The United States does not believe that a referral under ADR L.R. 3-5 would be beneficial in these cases.

### **CONSENT TO MAGISTRATE JUDGE**

The parties do not consent to have a magistrate judge conduct any further proceedings in these consolidated case.

### **OTHER REFERENCES**

The parties do not believe that binding arbitration or any other references are appropriate in these cases.

### **NARROWING OF ISSUES**

The parties anticipate that much of the documentary evidence can be introduced into evidence pursuant to stipulation. In addition, the parties are discussing the possibility of stipulating to the transcripts of the various recorded interviews conducted by the Revenue Agent assigned to the audits of Unico and Potter. The parties also anticipate that Motions for Summary Judgment, or Partial Summary Judgment will be brought before the Court. The United States believes that the trial of these cases should be accomplished in three different phases, as outlined in the Motions portion of this Statement.

### **EXPEDITED SCHEDULE**

The parties do not believe that these cases can be handled on an expedited basis.

### **SCHEDULING**

#### **Proposed Schedule**

Designate Expert Witnesses:	November 24, 2008
Designate Rebuttal Expert Witnesses:	December 16, 2008
Last day for expert discovery:	February 27, 2009
Last day for Fact Discovery:	March 31, 2009
Last day to file dispositive Motions:	April 30, 2009
Settlement Conference Date:	none requested at this time
Pretrial Conference Date:	At the Court's convenience

1 Trial Date:

At the Court's convenience

2 **TRIAL**

3 Neither party has requested a jury trial. The parties anticipate that the first phase of  
4 trial, determining tax liabilities related to the OEL arrangement, could last three weeks.

5 **DISCLOSURE OF NON-PARTY ENTITIES OR PERSONS**

6 The United States is exempted from the requirement of CLR 3-16. Unico and Potter  
7 filed their Certification on February 14, 2008. Unico and Potter again certify that they are not  
8 aware of any entity or person which has any financial interest of any kind in the subject matter  
9 of these consolidated cases.

10 **OTHER MATTERS**

11 The parties have nothing further at this time.

12 Dated: March 18, 2008

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